IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 01/10/2002

Coram

The Honourable Mr. Justice P. SHANMUGAM
and
The Honourable Mr. Justice M. CHOCKALINGAM

Criminal Appeal No.203 of 1995

Raju .. Appellant

-Vs-

State by Inspector of Police,
Pattukottai. .. Respondent

Prayer:- Appeal against the conviction and sentence passed by the Sessions Judge, Thanjavur in the Judgment dated 11.2.1995 rendered in Sessions Case No.125 of 1994.

!For Appellant : Mr. V. Bharathidasan

^For Respondent : Mr. V.M.R. Rajendran,
Addl. Public Prosecutor.

:J U D G M E N T

P. SHANMUGAM, J.

The appeal is against the judgment of the learned Sessions Judge, Thanjavur, finding the accused guilty of the charges under Section 302 of the Indian Penal Code and imposing upon him a sentence of life imprisonment. The accused is alleged to have poured kerosene on the deceased Mrs. Bakkiyam, wife of Ganesan and set her on fire at 10.30 am on 16.6.1994 at Mariappa Chettiar Colony, Kondikulam, consequent on which she died at 6 pm on 18.6.1994.

2. The case of the prosecution is that Mrs. Bakkiyam was living with her husband Ganesan, a lorry loadman and two children at Mariappa Chettiar Colony, Kondikulam. The deceased was aged 27 years at that time and was married to Ganesan ten years since. About ten days prior to the date of occurrence, while Mrs. Bakkiyam was working in the sugarcane field belonging to Nadimuthu Chettiar of Pattukottai, the accused, who was working with Nadimuthu Chettiar as his Accountant, called her for an illicit intercourse. Mrs. Bakkiyam, while refusing to concede to the demand, scolded him and also

informed her husband Ganesan about the same. Coming to know of this, the accused set fire to the haystack belonging to Nadimuthu Chettiar on 14.6.1994 and put the blame on Mrs. Bakkiyam by filing a police complaint against her. The police, who took her to the police station on 15.6.1994 for enquiry, let her off later. Ganesan was proposing to complain to the panchayat about the illegal demand of the accused to his wife and also as to his false complaint against her. On 16.6.1994, Ganesan was in his house as he was not doing well. At about 9 am, he went outside. At about 10 am, when the deceased was taking breakfast in her house, the accused came there in a cycle and parked it in the backyard of the neighbouring house and was trying to pour kerosene on her body. When she tried to get up and run, the accused shouted, "You have caused insult to me and I am not going to leave you without killing" and saying so, he poured kerosene and lighted the match. Immediately, her body caught fire and she cried and poured water and thereafter, she was taken to the hospital. When P.W.1 returned, he found his wife lying with burn injuries and on enquiry, she informed him that the Accountant namely Raju, the accused, came there in a bicycle with kerosene and told her that just because she was alive, he has been put to insult and saying that if she is burnt everything will be alright, he poured kerosene on her and set fire to her body. It was 10.30 am at that time and Ganesan immediately took her to the Government Hospital, Pattukottai and on their reference, she was admitted in the Medical College Hospital, Thanjavur. Notwithstanding the treatment, she succumbed to the injuries at 6 pm on 18.6.1994.

3. When the deceased was taken to the Government Hospital, Pattukottai, she was attended to by the doctor, P.W.8 who had issued Ex.P.9, the wound certificate at 11.50 am on 16.6.1994. As per this certificate, the burn injuries are said to have been caused on 16.6.1994 at 1 0.30 am while the deceased was at her house at Kondikulam by a known person by pouring kerosene and setting fire to her. According to the certificate, at the time of admission, the deceased was conscious and oriented, her pulse was 90/mt, her B.P. was 120/80 and she had suffered 90% of body surface burns. She was referred to the Thanjavur Medical College Hospital for management. P.W.8, in his examination-in-chief, says that while he examined her, she was in a conscious state and the blood pressure and heart beats were normal. In the crossexamination, he says that in reference to the injuries found on the body of the deceased, she sent an intimation to the police.

4. After the deceased was admitted in the Thanjavur Medical College Hospital, P.W.7, Judicial Magistrate No.III, Thanjavur received an intimation/requisition from the hospital, Ex.P.6, to take a dying declaration. Immediately thereafter, he went to the hospital at 8.40 pm on 16.6.1994 and the then doctor-on-duty Mr. Ramamurthy took him to Ward No.8 and identified to him, the deceased Bakkiyam, who was admitted as in-patient. After finding that the deceased was in a conscious state of mind and was in a position to understand his questions and after satisfying himself about her condition, he started the enquiry and recorded Exs.P.7 and P.8, the dying declaration.

5. The deceased died on 18.6.1994 at 6 pm and on intimation from the hospital authorities, P.W.1 went to the hospital at 9 am on 19.6.19 94 and the statement, Ex.P.1 was obtained from P.W.1. On the basis of this

statement, Crime No.64 of 1991 was registered under Section 30 2 I.P.C. At 11.30 am on 19.6.1994 and an Express First Information Report, Ex.P.11, was sent to the Magistrate on the same day. Thereafter, P.W.12, the Inspector of Police commenced further investigation on 19.6.1994 from 1.15 pm onwards. He conducted inquest on the dead body of the deceased between 3.30 and 5.30 pm. Thereafter, he sent the body for post-mertem examination and prepared a magazar of the scene of occurrence and the sketch, Exs.P.2 and P.13 respectively. He seized the burnt saree of the deceased M.O.1, her jacket M.O.2 and petty coat M.O.3. He also recorded the statement of the prosecution witnesses. The accused was arrested on 21.6.1994 and on the basis of the recovery statement under Section 27 of the Criminal Procedure Code, the plastic can M.O.5 was recovered in the presence of attesting witnesses. A charge was framed against the accused on 16.11.1994 and after questioning him under Section 313 Cr.P.C. on 3.2.1995 and upon considering the evidence let in on the side of the prosecution namely P.1 to P.15 as well as M.Os.1 to 5, the learned Sessions Judge found that the charge framed against the accused under Section 302 I.P.C. had been proved beyond any doubt and accordingly imposed life imprisonment on the appellant. The appeal is against this judgment and conviction.

6. Learned counsel appearing on behalf of the appellant, while assailing the judgment and conviction of the learned Sessions Judge, made the following submissions :

(1) The identity of the appellant has not been established.
(2) There is an inordinate delay in the filing of the F.I.R.
(3) No motive against the appellant has been established.
(4) The alleged dying declaration, in the absence of the certificate of fitness of the deceased, is defective and cannot be acted upon.

7. The learned Additional Public Prosecutor, while seeking to sustain the finding and conviction of the learned Sessions Judge, submitted that though the important witnesses P.Ws.1, the husband of the deceased, P.W.2, her son as well as P.W.3 have turned hostile, their admission, coupled with the evidence of the doctor, P.W.8 and the dying declaration made by the deceased, which sufficiently corroborates the statement of the deceased, as also her mental condition would clearly establish the complicity of the criminal act of the accused. He also referred to the intimation given by P.W.8 and the inquest report which offset the improper investigation done by the investigating officer in this case. He counters the argument that the dying declaration has not been taken in compliance with the requirement and proof that the deceased was in a sound state of mind and prayed for confirmation of the finding and conviction.

8. We have heard the counsel for the appellant and the learned Additional Public Prosecutor and considered the matter carefully.

9. IDENTITY OF THE ACCUSED :
The accused stood charged as per the Charge dated 16.11.1994 framed against him by the Sessions Judge, Thanjavur. In the said Charge, the

accused has been clearly identified as Raju, son of Palaniappa Thevar. The accused had been examined under Section 313 Cr.P.C. on 3.2 .1995 and Question Nos.3 and 12 specifically implicate the accused with the offence, for which the reply from him was that it was false. Question No.13 is as follows :
"Qn. : Do you want to say anything else ?
Ans. : Nothing."
P.W.12, the investigating officer has stated that on his enquiry, P. W.1 has stated that the Accountant Raju, namely the accused herein, has set the deceased on fire. P.W.2, her son has stated that his mother had told him that the Accountant Raju had set her on fire. P.W.3 also, according to the investigating officer, is said to have stated before him that the husband of the deceased was crying stating that the Accountant Raju working with Nadimuthu Chettiar, poured kerosene and set her on fire. P.W.5, Nadimuthu Chettiar had also stated that only at the instance of Raju, he had given a complaint stating that the deceased had set fire to his haystack. In the cross-examination, no question was put or any suggestion made as to the identity of the accused excepting a general suggestion that there is no connection between the accused with the case, which denied to by the investigating officer. It is only P.W.13, the Circle Inspector of Police, who says that he had not enquired the Village Administrative Officer and denied the suggestion that because there are a number of persons named Raju, he had not made further enquiries.

10. In this case, we find that Ex.P.1, the complaint, Ex.P.11, the Express F.I.R., Exs.P.7 and P.8, the dying declaration of the deceased, all clearly and categorically refer to the Accountant Raju working with Nadimuthu Chettiar of Kondikulam. The dying declaration also refers to Raju of Alivalam. The fact is that the accused is a native of Alivalam and that his name is referred to in the charge as son of Palaniappa Thevar and he was specifically put a question in the examination under Section 313 Cr.P.C. on his involvement in the offence, for which he has replied that it is false and at no stage, he had questioned his identity as spoken to by the prosecution witnesses and by the deceased in her dying declaration. His contention that his name is referred to as Alivalam Raju in the dying declaration and as Accountant Raju in the F.I.R. and hence there is no proof to show that it is the same person, is not sustainable. Simply because one Natarajan belonging to Alivalam was also employed by P.W.5, Nadimuthu Chettiar, it cannot be stated that Alivalam Raju was not working with Nadimuthu Chettiar, as found in the F.I.R. There is no substance in the said submission. If really the appellant is not a properly identified person and it was a mistaken identity for some other Raju, the normal reasonable conduct of a person would be to raise this contention at least at the stage of framing of charge, thereby questioning the same and filing an appropriate application before the court seeking to quash the proceedings on that ground. Taking

advantage of an improper investigation of the case and certain inconsistent statements and on the witnesses turning hostile, the appellant is trying to escape on this plea.

11. DELAY :

It is true that the occurrence took place at 10 am on 16.6.1994. However, the F.I.R. came to be registered only at 11.30 am on 19.6.199 4. The deceased died at 6 pm on 18.6.1994. The reason for the delay as stated in the F.I.R. is that only after getting the statement from P.W.1 from the hospital, there was a delay in the registration of the F.I.R. It is true that the investigating officer has committed a serious lapse in not going to the hospital immediately on receipt of the intimation from P.W.8, who clearly and categorically says that when Mrs. Bakkiyam, the deceased was brought to the hospital at 11.15 am with 90% burn injuries, he had treated her and sent an intimation to the police. He also says that the deceased was conscious at that time and that he had examined her and she informed him that a known person had poured kerosene and set fire to her body. This is the information that he had intimated to the police. Therefore, the commission of a cognizable offence had intimated, as per the statement of P.W.8, which is corroborated by Ex.P.9, the wound certificate and further, the other medical evidence like the post-mortem certificate as well as the dying declaration made before the Judicial Magistrate fully corroborate the information given by P.W.8. to the police. The investigating officer has clearly suppressed this intimation and registered the case long after the death of Mrs. Bakkiyam. However, in our view, this delayed registration of the case does not affect the core case of the prosecution.

12. MOTIVE :
The motive in this case for the accused to set the deceased on fire has been clearly stated in Ex.P.1, complaint. However, it is argued on behalf of the appellant that inasmuch as P.W.1 has turned hostile, the whole of the information cannot be relied upon for the proof of guilt of the appellant. But, it has to be remembered that the facts stated in Ex.P.1, complaint and Ex.P.11, the F.I.R. have been corroborated by other material evidence like the statement of P.W.8 and the dying declaration of the deceased, Exs.P.7 and P.8. In Ex.P.1, complaint, the motive for the accused to set the deceased on fire is said to be the following :
(1) the deceased refused to concede to his illegal demand of gratification to have a sexual intercourse with him;
(2) the deceased had informed about this incident to her husband;
(3) infuriated by her refusal and her informing her husband about the same, the accused is said to have set fire to the haystack of Nadimuthu Chettiar and lodged a false police complaint against the deceased;
(4) the police let her off after enquiry;
(5) the husband of the deceased is said to have informed his wife that he would place the illegal request of the accused as well as his false complaint before the panchayat.

13. In the dying declaration, Exs.P.7 and P.8, the deceased has stated that the accused is said to have told her, "You have caused a damage to me and I am not going to let you live" and so saying, poured kerosene and set her on fire.

14. The argument of the counsel for the appellant is that there is no explanation as to what damage the deceased had done to the accused and therefore, there is no motive. This argument is without understanding the

real background of the case. The reference that the deceased has committed damage to his reputation only means that his illegal demand his false complaint against the deceased had been made known to everybody and only that has caused damage to him. In the above circumstances, we do not find any substance in the argument that there is no motive for the accused to commit the murder of the deceased.

15. DYING DECLARATION :
P.W.7, Judicial Magistrate No.III, Thanjavur has stated that on receiving the requisition Ex.P.6, he went to the hospital at 8.40 pm and he was taken to Ward No.8 by Dr. Ramamurthy, who was the doctor-onduty then. He has recorded the following as dying declaration as per Exs.P.7 and P.8 :

"Today, 16.6.1994, at about 8.20 pm, on receipt of the memo, I went to the Thanjavur Medical College Hospital for the purpose of recording the dying declaration. I went to the Medical College Hospital at 8.40 pm and I was shown Mrs. Bakkiyam who was admitted and undergoing treatment under the duty doctor Dr. Ramamurthy, who identified her to me. After taking all the precautions, I commenced my investigation.

Qn. : What is your name ?
Ans.: My name is Bakkiyam.
Qn. : What is your husband's name ?
Ans.: My husband's name is Ganesan.
Qn. : Where are you living ?
Ans.: At Mariappa Chettiar Colony, Kondikulam, Alivalam Post, Pattukottai Taluk, Pattukottai Police Station.
Qn. : Do you know that I am the Judicial Magistrate, Thanjavur ?
Ans.: I have understood.
Qn. : Are you in a good conscious state of mind ?
Ans.: I am in a good conscious state of mind.

Since the patient had answered all the questions properly and on finding that she was in a conscious state of mind and was fit enough to give the declaration and on being satisfied, I continued my enquiry.

Qn. : You can now say as to when and how this fire accident took place.
Ans.: At about 10 am on 16.6.1996 morning, in the backside of my house, I was sitting under a tree and taking food. Alivalam Raju parked his bicycle in the next backyard and poured kerosene brought with him and when I tried to get up, saying, "Where are you trying to run, you have caused damage to me and I am not going to leave without killing you", he threw a match-stick and set fire on me. Immediately, the fire caught my body. I ran and poured water. People came running after hearing my shout. I was taken to the

Government Hospital, Pattukottai and since they said that they could not treat me, they brought me to this hospital. That is all what happened."

Completion of enquiry - Night 9.10 pm.
Left Hand Thumb Impression
Mrs. Bakkiyam

Ex.P.8
16.6.94 I hereby certify that the patient was fully conscious and that the dying declaration made in my presence had been recorded.
Sd/- Dr.
R. Ramamurthy

I had recorded the dying declaration of the patient in the presence of the duty doctor. I read over the statement to the patient who had accepted the same as having been stated by her. I have taken the L.T.I. of the patient.

Sd/-
R. Ganesan
Judicial Magistrate No.III
Thanjavur."

16. P.W.8, the doctor has also stated in his chief-examination that while the Magistrate was taking the dying declaration, the duty doctor was all along present with him and that the doctor has given a certificate to the effect that the patient, namely the deceased, was in a fit condition to give the statement. The doctor has also said in the cross-examination, "He did not doubt when the deceased had stated that Alivalam Raju is the person who had committed the crime". The evidence of the Judicial Magistrate, P.W.7 and the evidence of the doctor, P.W.8 fully corroborate as to the condition of the deceased while giving the dying declaration. She was fully conscious in the morning on 16.6.1994 and she was aware that the doctor had referred her to the Thanjavur Hospital and she was also aware that she was being taken to the Thanjavur Hospital and was fully conscious when the duty doctor brought the Magistrate to her and identified her to him and was in a position to give the dying declaration. The important aspect of this case is that the duty doctor was present during the full course of recording the dying declaration which commenced at 8.40 pm and ended at 9.10 pm on 16.6.1994. The duty doctor did not object to the declaration being taken on the ground that she was not in a fit condition to give the dying declaration. The main thrust of the argument of the counsel for the appellant is that there is no separate certificate obtained from the doctor to the effect that she was in a position to give the dying declaration. At the risk of repetition, it has to be stated that the fact that the deceased was in a conscious state of mind has been spoken to by P.W.8, as evidenced by Ex.P.9, wound certificate, where she had informed the name of the person who had caused the burn injuries, to the doctor. At that time, it was written as a known person in that certificate and no question was asked to P.W.8 as to the

information given to him by the deceased in the morning and in the same evening, in the presence of the duty doctor, when the dying declaration was taken. The doctor has also attested the dying declaration to the effect that the deceased was in a complete conscious state of mind to give the dying declaration. Therefore, the argument that there should have been a further certificate from the doctor as to her suitability to give a dying declaration does not arise for consideration in this case.

17. Though the eye-witnesses have gone back and have turned hostile, we have got other intrinsic evidence, apart from the dying declaration. In other words, the dying declaration is corroborated by other material evidence in this case. The inquest report, Ex.P.12 records the result of the enquiry under columns 9 and 11 as to the reasons for the death. This aspect has not been disputed when P.W.12 has spoken to about the report.

18. Even though P.W.1, the husband of the deceased has turned hostile, he admits of taking her to the Government Hospital, Pattukottai and then to the Thanjavur Medical College Hospital. The wound certificate, Ex.P.9 says that the deceased was brought by Ganesan, her husband. The wound certificate, coupled with the statement of P.W.8 that while she was in her house, a known person came and poured kerosene on her and that when she was examined, she was fully conscious and that he had sent a report to the police station all clearly suggest that the deceased was conscious while giving the dying declaration.

19. The dying declaration, as such, cannot be said to be defective and has been recorded after observing the required formalities and finding the condition of the patient that she was capable of giving the statement and the doctor was standing near the Magistrate through his taking the evidence and attesting the same by the patient as well as the doctor. That apart, the dying declaration has been corroborated by the statement of P.W.8 and the wound certificate and the enquiry conducted during inquest. Therefore, we do not find any infirmity in the dying declaration of the deceased, which by itself, is sufficient and which can be fully relied upon for the purpose of proving the guilt of the accused.

20. The decisions referred to by either side in reference to the dying declaration can now be looked into. In CHANDRA NARAIN YADAV VS. SHIBJEE YADAV (1999 CRL. L.J. 5009), it was held by the Supreme Court that it is too well settled that a dying declaration, if found to be true and voluntary, can form the sole basis of conviction even without any corroboration. The Supreme Court, after scrutinising the dying declaration in that case, found that the Magistrate had recorded the dying declaration in the presence of the doctor and it must be held to be voluntary and truthful one and therefore, the court can safely rely upon it. In PANCHDEO SINGH VS. STATE OF BIHAR [2002 (1) S.C.C. 577], the Supreme Court held that in the case of a dying declaration, the issue is to whether the dying declaration has been able to bring about a confidence thereon or not - is it trustworthy or is it a mere attempt to cover up the laches of investigation; it must allure to the satisfaction of the court that reliance ought to be placed thereon rather than a distrust; the confidence of the court is the summum bonum and in the event

of there being any affirmation thereto in the judicial mind, question of disbelief or distrust would not arise. There is no form as such of dying declaration, neither the declaration need be of any longish nature and neatly structured. The declarant should be able to recollect the situation resulting in the available state of affairs. Of course, on the facts in that case, it was found that there was no doctor's certification as regards the state of condition of the declarant and the Magistrate did not recollect as to whether the deceased did put his signature or not and hence, it was held that it is not possible to record confidence in the dying declaration in the said case.

21. In RAM BIHARI YADAV VS. STATE OF BIHAR (1998 S.C.C. CRL. 1085), it was held that dying declaration can be acted upon without corroboration and its probative value depends upon the facts and circumstances of the case. In that judgment, their lordships also held that an act or omission by the prosecution should not be taken in favour of the accused, if deliberately done. Their lordships observed as follows :

"Where the record shows that the investigating officers created a mess by bringing on record dying declaration and GD Entry and have exhibited remiss and/or deliberately omitted to do what they ought to have done to bail out the appellant who was a member of the police force or for any extraneous reason, the interest of justice demands that such acts of omissions of the officers of the prosecution should not be taken in favour of the accused, for that would amount to giving premium for the wrongs of the prosecution designedly committed to favour the appellant. In such cases, the story of the prosecution will have to be examined dehors such omissions and contaminated conduct of the officials; otherwise, the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice."

It was further held in that case that the mental condition of the maker or the declarant, alertness of mind, memory and understanding of what he is saying are matters which can be observed by any person. But, to lend assurance to those factors having regard to the importance of the dying declaration, a certificate of the medically people is insisted upon and in the absence of availability of a doctor to certify the above mentioned factors, if there is other evidence to show that the recorder of the statement has satisfied himself about those requirements before recording the dying declaration, there is no reason as to why dying declaration should not be accepted. The ratio of the above judgment and the observation squarely applies to the facts of the present case. In this case, the Magistrate, who recorded the dying declaration and the Doctor, who was standing by the side of the patient when the dying declaration was given have satisfied themselves as to the mental condition and the capacity of the declarant to give the dying declaration. The mere omission to state in the certificate, apart from the fact that the declarant was conscious, but was also fit enough to give the declaration does not, in our view, take away the effect of the dying declaration. The prosecution, in this case, is guilty of certain commissions and omissions, which in our view, could not have been done ignorantly and therefore, even if

there is any technical omission, we are satisfied that the dying declaration was genuine and was validly taken.

22. In KOLI CHUNILAL SAVJI VS. STATE OF GUJARAT (A.I.R. 1999 S.C. 3 695), it was held that it is no doubt true that before recording the declaration, the concerned officer must find that the declarant was in a fit condition to make the statement in question, but on account of the absence of the doctor while recording the dying declaration, the said declaration will not lose its value and can be accepted. With regard to the condition of the deceased, when a doctor introduces the deceased to the Magistrate and the doctor has stated that she was in a conscious condition and if it further appears from the evidence that though there has been no endorsement on the declaration recorded by the Magistrate with regard to the mental condition of the deceased, but there has been an endorsement of Police yadi indicating that the deceased was fully conscious, the dying declaration can be relied upon in the absence of the endorsement of the doctor thereon. Their lordships distinguished the judgment in MANIRAM VS. STATE OF MADHYA PRADESH (A.I.R. 1994 S.C. 840) wherein it was held that it was the duty of the person who recorded the dying declaration to do so in the presence of the doctor and after duly being certified by the doctor that the declarant was conscious and in senses and was in a fit condition to make the declaration. While considering this case, the Supreme Court held that in the said case, the court also thought it unsafe to rely upon the dying declaration on account of the above said infirmity and interfere with the judgment of the High Court. But, the above said requirement is merely a rule of prudence, and the ultimate test is whether the dying declaration can be held do be a truthful one and voluntarily given. It is no doubt true that before recording a declaration, the concerned officer must find that the declarant was in a fit condition to make the statement in question.

23. In PAPARAMBAKA ROSAMMA VS. STATE OF ANDHRA PRADESH [1999 (7) S.C.C. 695], it was held that in medical science, two stages namely conscious and fit state of mind are distinct and are not synonymous. One can be conscious, but not necessarily in a fit state of mind. The certificate of the doctor should state that the declarant was in a fit state of mind at the time of making the declaration. In this case, the Supreme Court held that it would be very much risky to accept the subjective satisfaction of the Magistrate regarding the mental condition of the declarant and besides, in that case, there were other infirmities which raised a reasonable doubt as to whether the injured was in a fit disposing state of mind. The above said judgments were referred to the Constitutional Bench of the Supreme Court in LAXMAN VS. STATE OF MAHARASHTRA (2002 A.I.R. S.C.W. 3479). The Constitutional Bench held that the requirement of medical certification that the injured was in a fit state of mind at the time of making the dying declaration and it would be very much risky to accept the subjective satisfaction of the Magistrate has been too broadly stated and is not the correct enunciation of law. Their lordships observed as follows :

"It is indeed a hyper-technical view that the certification of the doctor was to the effect that the patient is conscious and there was no

certification that the patient was in a fit state of mind specially when the magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration. Therefore, the judgment of this court in Paparambaka Rosamma and others v. State of Andhra Pradesh, 1999 (7) SCC 695 must be held to be not correctly decided and we affirm the law laid down by this Court in Koli Chunilal Savji and another v. State of Gujarat, 1999 (9) SCC 562 case."

24. In LAKSHMI VS. OM PRAKASH & OTHERS [2001 (6) S.C.C. 118], it was held that the main test of reliability of a dying declaration is mental and physical fitness and capability to make the statement at that point of time. Their lordships held as follows :

"A dying declaration not being a deposition in court, neither made on oath nor in the presence of the accused and therefore not tested by cross-examination is yet admissible in evidence as an exception to the general rule against the admissibility of hearsay. The admissibility is founded on the principle of necessity. The weak points of a dying declaration serve to put the court on its guard while testing its reliability and impose on the court an obligation to closely scrutinise all the relevant attendant circumstances {see Tapinder Singh v. State of Punjab (1970) 2 SCC 113}. One of the important tests of the reliability of the dying declaration is a finding arrived at by the court as to satisfaction that the deceased was in a fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made and/or recorded. The statement may be brief of longish. It is not the length of the statement but the fit state of mind of the victim to narrate the facts of occurrence which has relevance. If the court finds that the capacity of the maker of the statement to narrate the facts was impaired or the court entertains grave doubts whether the deceased was in a fit physical and mental state to make the statement the court may in the absence of corroborating evidence lending assurance to the contents of the declaration refuse to act on it. In Bhagwan Das v. State of Rajasthan (AIR 1957 SC 589) the learned Sessions Judge found inter alia that it was improbable if the maker of the dying declaration was able to talk so as to make a statement. This Court while upholding the finding of the learned Sessions Judge held the dying declaration by itself insufficient for sustaining a conviction on a charge of murder. In Kake Singh v. State of M.P. (AIR 1982 SC 1021) the dying declaration was refused to be acted upon when there was no specific statement by the doctor that the deceased after being burnt was conscious or could have made a coherent statement. In Darshan Singh v. State of Punjab (AIR 1983 SC 554) this Court found that the deceased could not possibly have been in a position to make any kind of intelligible statement and therefore said that the dying declaration could not be relied on for any purpose and had to be excluded from consideration. In Mohar Singh v. State of Punjab (AIR 1981 SC 15 78) the dying declaration was recorded by the investigating officer. This Court excluded the same from consideration for failure of the investigating officer to get the dying declaration attested by the doctor who was alleged to be present in the hospital or anyone else present."

In this case, the dying declaration is corroborated by the inquest report, Ex.P.12, wherein the reasons for the death were recorded as per the statement made during the inquiry. Ex.P.9, the wound certificate is substantiated by the evidence of the doctor, P.W.8, wherein it is stated that a known person came to the deceased and poured kerosene on her and that she was fully conscious. The doctor further says that he has sent a report to the police station as to this medicolegal case. Thus, this judgment also supports the case of the prosecution.

25. In the light of the principles laid down by the Supreme Court in the decisions referred to , we have scrutinised all the relevant and attendant circumstances in this case. In Exs.P.7 and P.8, it is seen that the Magistrate, after examining the declarant in reference to her identity and having questioned her as to whether she was conscious and upon getting the reply from her that she was fully conscious and it was only after being fully satisfied that the patient was replying properly and that she was in a fully conscious state of mind that the Magistrate continued the further questioning as to the occurrence. The Magistrate, who had deposed as P.W.7 in his chiefexamination, has stated that he was fully satisfied that the patient was conscious and that she was in a fit condition to answer his questions. He further says that the duty Doctor Ramamurthy was by his side throughout the period of his recording the dying declaration. He says that the patient was in a fit condition to give the declaration. Therefore, an omission in the endorsement to state that the patient was not only conscious, but also fit enough to give the dying declaration should be considered as a technical lapse in this case, since the evidence of the Magistrate is to the effect that the doctor has certified that the patient was in a fit condition to give the declaration and that he was also satisfied as to her condition, independent of the doctor's certificate. Therefore, we have no reason to reject the full effect of the dying declaration in this case, considering the facts and circumstances. This is a case which has to be examined dehors omission, if any, considering the conduct of the investigating agency of deliberately failing to investigate the case properly.

26. In Gradwohl's Legal Medicine - Second Edition, while dealing with burns by fire at page 381, the learned author says as follows :

"Even with most extensive burns, some period of survival is common, especially in the young."

In this case, the deceased survived for two days.

27. In HWV Cox Medical Jurisprudence and Toxicology - Seventh Edition, in the Chapter dealing with Injuries from Physical Agents, Heats Burns and Scalds, at page 537, the learned author has the following to say :

"To estimate the amount of body involved, the 'Rule of Nine' can be applied, which is the rough estimate of the area of burns. The head and each arm are allotted nine percent of the body surve, eighteen percent each for the front and back of the trunk and nine percent each for the front and back of each leg. Using this rough estimate, burns totalling thirty

percent or more of the surface area are associated with a very poor prognosis, especially in old people."

The medical opinion given by the doctor P.W.9, in this case, who conducted the autopsy on the body of the deceased and issued the postmortem certificate is to the effect that the deceased would appear to have died due to the effect of burns. The wound certificate, Ex.P.9 issued at 11.50 am on 16.6.1994 says :

"Patient conscious, oriented; Perla Pulse 90/mt; B.P. 120/80"

The doctor who issued the wound certificate has also given evidence as P.W.8 that the patient was conscious and that the blood pressure and pulse was in a normal condition. However, he said, she had 90% of burn injuries and was therefore sent to the Thanjavur Medical College Hospital. From the above, it is not established that the patient was not in a fit condition to give the declaration. Taking into account the facts and circumstances of the case, we can safely infer that the doctor,who was standing by the side of the Magistrate while he was recording the dying declaration, would not have permitted the declaration being taken if the patient was not fit enough to give the dying declaration. The doctor has also certified that the patient was fully conscious, that the patient had made the declaration in his presence and that the same was declared in his presence.

28. The learned Sessions Judge, after having considered the evidence on record, in our view, has correctly rejected the plea of the accused and found him guilty for the offence under Section 302 I.P.C. We do not find any ground whatsoever to differ from the said view of the learned Sessions Judge. We therefore confirm the said finding and the sentence imposed upon the appellant and hold that the appellant is indeed guilty of the offence under Section 302 I.P.C. The appeal is accordingly dismissed. The court below is directed to take immediate steps to secure the appellant and commit him to undergo the remaining period of imprisonment.

Index : Yes (P.S.M., J.) (M.C., J.)
Internet : Yes 01..10..2002
ab

To

1. The Sessions Judge, Thanjavur.
2. The District Collector, Thanjavur.
3. The Director General of Police, Chennai-4.
4. The Superintendent, Central Prison, Trichy.
5. The Public Prosecutor, Chennai.
6. The Judicial Magistrate, Pattukottai.
7. The Judicial Magistrate, Pollachi through the Chief Judicial Magistrate, Thanjavur.
8. The Inspector of Police,

Pattukkottai.

ab
P. SHANMUGAM, J.
and
M. CHOCKALINGAM, J.

Judgment in
Criminal Appeal No.203 of 1995